UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES FRANKLIN DUNN, Appellant, vs. CALIFORNIA DEPARTMENT OF CORRECTIONS, CALIFORNIA ADULT AUTHORITY, et al., and L. S. NELSON, Warden, Appellees.	No. 22301

APPELLEES' BRIEF

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TOPICAL INDEX

	Page
JURISDICTION	1
STATEMENT OF THE CASE	1
A. Proceedings in the State Courts	1
B. Proceedings in the Federal Courts	2
STATEMENT OF THE FACTS	3
APPELLANT'S CONTENTIONS	6
SUMMARY OF APPELLEES' ARGUMENT	6
ARGUMENT	
I. THE ADULT AUTHORITY'S DECISION TO REVOKE PAROLE MAY PROPERLY BE RESTED EITHER ON APPELLANT'S ADMITTED USE OF DEXEDRINE, OR HIS POSSESSION OF MARIJUANA, AS FOUND BY THE ADULT AUTHORITY, OR BOTH	7
II. APPELLANT HAD NO CONSTITUTIONAL RIGHT TO APPOINTMENT OF COUNSEL OR CONFRONTATION OF WITNESSES AT HIS PAROLE REVOCATION HEARING	13
CONCLUSION	13

TABLE OF CASES

	Page
Draper v. Rhay, 315 F.2d 193 (9th Cir.), cert. denied, 375 U.S. 915 (1963)	11
Eason v. Dickson, No. 20,303 (9th Cir., January 30, 1968)	13
Fox v. Stanford, 123 F.2d 334 (5th Cir. 1941)	10-11
In re Hall, 63 Cal.2d 115, 403 P.2d 389, 45 Cal. Rptr. 133 (1965)	10
Hyser v. Reed, 318 F.2d 225 (D.C. Cir.), cert. denied, 375 U.S. 957 (1963)	8
United States ex rel. Howard v. Ragen, 59 F. Supp. 374 (N.D. Ill, 1945)	9
United States ex rel. Meiner v. Ragen, 199 F.2d 798 (7th Cir. 1952)	9
Williams v. Dunbar, 377 F.2d 505 (9th Cir.), cert. denied, 389 U.S. 866 (1967)	10, 13, 15

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APPELLEES' BRIEF

JURISDICTION

The jurisdiction of the United States District Court, Northern District of California, to entertain appellant's application for a writ of habeas corpus was conferred by Title 28, United States Code, section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code, section 2253. Proceedings in forma pauperis are authorized by Title 28, United States Code, section 1915.

STATEMENT OF THE CASE

A. Proceedings in the State Courts

Appellant was convicted on July 3, 1959, in the Superior Court of the County of Alameda, upon his plea of guilty, of one count of possession of a narcotic, in violation of California Health and Safety Code section 11500.

He was sentenced to state prison for the term prescribed by law. People v. James Franklin Dunn, No. 30572 (CT 66). He did not appeal this judgment. Appellant filed an application for a writ of habeas corpus in the Superior Court of Tuolumne County on May 24, 1966. An order to show cause was issued on June 2, 1966, and a return to the order to show cause was filed by the respondents therein named on June 17, 1966. On June 28, 1966, the writ was denied in an unpublished opinion. Appellant's application for a writ of habeas corpus in the Court of Appeal, Fifth Appellant District, was filed on September 6, 1966, and denied on September 7, 1966. Appellant's application for a writ of habeas corpus in the Supreme Court of California was filed on October 13, 1966, and denied on November 16, 1966. These applications raised the same issues now before this Court. (CT 58).

B. Proceedings in the Federal Courts

On November 28, 1966, appellant filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California (CT 1). On December 16, 1966, appellant filed a document entitled "Motion for Leave to Add Supplemental Facts and Authorities with Exhibits" (CT 20). On February 9, 1967, the Honorable Robert F. Peckham entered an order denying appellant's petition (CT 46). On February 16, 1967, appellant filed a Motion for Rehearing, addressed to Judge Peckham (CT 48). On March 13, 1967, Judge Peckham issued an order requiring

appellees to show cause why a writ of habeas corpus should not be issued (CT 56). Appellees responded with Return to Order to Show Cause and Points and Authorities in Opposition to Petition for Writ of Habeas Corpus, filed March 21, 1967 (CT 57). A document entitled "Traverse Brief" was filed by appellant on March 28, 1967 (CT 74). A hearing was held on March 30, 1967, and on April 17, 1967, Judge Peckham entered an order denying the petition (CT 86). On April 27, 1967, appellant filed motions for certificate of probable cause to appeal, for leave to appeal in forma pauperis, and for appointment of counsel (CT 89). Judge Peckham denied these motions in an order filed May 17, 1967 (CT 101). On May 31, 1967, appellant duly filed a motion for reconsideration of his motion for a certificate of probable cause to appeal (CT 103). And on September 13, 1967, appellant filed a document entitled "Supplement to Motion for Rehearing for Certificate of Probable Cause to Appeal" (CT 111). Persistence was again rewarded, and on September 28, 1967, Judge Peckham issued an order granting a certificate of probable cause (CT 119). Notice of Appeal and a Motion for Appointment of Counsel were filed on October 6, 1967 (CT 120, 124).

STATEMENT OF THE FACTS

Appellant was paroled on November 7, 1960, after having served 16 months of his sentence. On December 20, 1961, his parole was suspended and he was returned to prison. He was paroled again on July 20, 1962 (CT 72). All went well until May 13, 1963, when appellant disclosed to

his therapist, a Mr. Jensen, that he had been taking heavy doses of Dexedrine pills. A violation report was submitted to the Adult Authority, which ordered appellant continued on parole (CT 68).

According to a subsequent report to the Adult Authority, agents of the Bureau of Narcotic Enforcement received information that appellant was residing at a certain address with one Myrna Woods, also known as Myrna Lou Goodrow, and engaged in large-scale marijuana traffic. A search warrant was obtained for the residence and appellant's person. Officers went to the residence, where they saw appellant and Miss Woods in her car. After the officers had identified themselves and announced that they had a search warrant, they observed Miss Woods reach into her purse and throw something out of the right front vent window. A search of the area beneath the window disclosed four white marijuana cigarettes and 16 white tablets. A search of appellant's person yielded six white tablets from his pocket. One marijuana cigarette and seven white tablets were found on the seat of the car. (CT 68-69).

A search of appellant's apartment disclosed a number of smoking pipes, a small blue box containing suspected marijuana, a partially-smoked marijuana cigarette, two kilos of marijuana, and a package of cigarette papers. Marijuana debris was found in a new work shirt in the bedroom closet. (CT 69).

Appellant and Miss Woods were charged with violating California Health and Safety Code section 11530 (possession of marijuana). The violation report states that the two appeared in court, and that Miss Woods (Miss Goodrow), pleaded guilty and exonerated appellant of any knowledge of the marijuana found in their apartment. (CT 69). Here the violation report (appellees' exhibit below) differs from one of appellant's exhibits below. At CT 34-37, appellant sets out a purported true copy of a transcript of the proceedings in connection with Miss Goodrow's plea. While they show that she made a judicial confession of guilt, they are barren of any reference to appellant or any intimation that he did not jointly possess the marijuana with her.

At any rate, the District Attorney successfully moved that the charge against appellant be dismissed (CT 37, 69-70).

A violation report was submitted to the Adult Authority, charging appellant with having violated parole by using a dangerous drug, Dexedrine (based on appellant's disclosure to his therapist of his use of the drug on May 13, 1963), and by possessing marijuana. (CT 68). Appellant's parole was cancelled. At a hearing before the Adult Authority on February 10, 1964, appellant pleaded guilty to count 1 (the dexedrine charge) and not guilty to count 2 (the marijuana charge). He was found guilty of count 2, and his parole revoked (CT 73).

APPELLANT'S CONTENTIONS

Appellant contends that his parole was improperly revoked because:

(1) The Adult Authority, having once declined to revoke his parole for using Dexedrine, could not properly use the same violation of parole as the basis for revocation of parole.

(2) The dismissal of the charges against him by the Municipal Court amounted to an acquittal on the marijuana charge.

(3) There was not sufficient evidence of his guilt of the marijuana charge.

(4) He was denied due process by not being afforded the right to counsel and to confront witnesses at his revocation hearing. (This contention appears to have been abandoned on appeal, as we cannot find it in appellant's brief.)

SUMMARY OF APPELLEES' ARGUMENT

I. The Adult Authority's decision to revoke parole may properly be rested either on appellant's admitted use of Dexedrine, or his possession of marijuana, as found by the Adult Authority, or both.

II. Appellant had no constitutional right to appointment of counsel or confrontation of witnesses at his parole revocation hearing.

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ARGUMENT

I

THE ADULT AUTHORITY'S DECISION TO REVOKE PAROLE MAY PROPERLY BE RESTED EITHER ON APPELLANT'S ADMITTED USE OF DEXEDRINE, OR HIS POSSESSION OF MARIJUANA, AS FOUND BY THE ADULT AUTHORITY, OR BOTH

With respect to appellant's claim that his parole revocation was unconstitutional because based on insufficient evidence, the Court below made the following observations:

> "A prisoner has no constitutional right to parole. Escoe v. Zerbst, 295 U.S. 490, 55 Supt. Ct. 818, 79 L. Ed. 1566 (1935). Thus, the scope of inquiry into state parole revocation by a federal court in Habeas Corpus proceeding is very narrow, and is limited to looking for denial of equal protection or denial of the minimum standards of due process. Thus, absent a showing that the Adult Authority has acted arbitrarily or capriciously, or that petitioner has been treated differently than others similarly situated, no federal question is presented.
>
> "The main thrust of petitioner's attack is that the Adult Authority had so little evidence on which to base the revocation of his parole, that their action was entirely arbitrary and therefore violated his rights of due process. As stated above, the scope of review of the Adult Authority's

action is extremely narrow. This court need only find that some evidence of violation of parole conditions did exist." (CT 86-87).

It is our position that the above statement of the law represents that view most favorable to appellant. We would establish, in a proper case, that alleged insufficiency of evidence supporting parole revocation by state agencies simply does not present a federal question. We have found no authority that it does, and only one case holding that, in extreme cases, the sufficiency of evidence supporting parole revocation by a federal parole board is subject to judicial review. See Hyser v. Reed, 318 F.2d 225, 240 (D.C. Cir.), cert. denied, 375 U.S. 957 (1963). However, we may assume without conceding that the Constitution forbids state parole revocation which is wholly arbitrary, for appellant's parole revocation was manifestly justified by the evidence presented to the Adult Authority.

We should like to treat first a ground of revocation the merits of which the District Court did not reach: the plea of guilty to a charge of using Dexedrine (CT 87). Appellant's claim is that this charge could not properly be used as a basis of revocation, since the Adult Authority had earlier permitted appellant to continue on parole. He claimed below a denial of due process in that the charge "was held over the petitioner's head to be used at some indefinite and/or remote time . . . ." (CT 48A).

We have found no authority that would prevent the Adult Authority from changing its mind on the question of whether an admitted parole violation should result in revocation. Appellant's heavy reliance on United States ex rel. Howard v. Ragen, 59 F. Supp. 374 (N.D. Ill. 1945) is misplaced. That case held only that a state may not revoke parole after expiration of the period for which the parolee was originally sentenced, when the state had expressly refused to do so during pendency of the original term. All of the elaborate dicta quoted by petitioner were directed to this basic proposition. Furthermore, the Howard case was expressly overruled in United States ex rel. Meiner v. Ragen, 199 F.2d 798, 800 (7th Cir. 1952). While the District Court did not find it necessary to reach the merits of appellant's claim in connection with the Dexedrine charge, we submit that the claim is without substance, and that the Adult Authority could constitutionally redetermine the question of whether appellant's admitted use of Dexedrine should result in revocation of his parole. Moreover, by pleading guilty to the Dexedrine charge, appellant waived any claim that it was improperly used as a basis for parole revocation.

Appellant still claims that he was innocent of count 2--possession of marijuana. The District Court, however, found

> "that the evidence before the Adult Authority with regard to the charge of possession of

marijuana was more than sufficient to be the basis for them to make a rational decision finding a violation of parole conditions by petitioner." (CT 87).

This finding is plainly supported by the evidence, which showed that large quantities of marijuana had been found throughout appellant's residence. This evidence has been detailed above, and we will not repeat it here. Although the Adult Authority was under the impression, apparently incorrect, that appellant's lady friend had testified as to his innocence, that testimony was evidently not accepted as true. We submit that the Adult Authority was no more bound by this alleged testimony than a jury would have been. Just as a jury could have disregarded the testimony and convicted appellant, so could the Adult Authority disregard it and find that appellant had violated his parole. The evidence before the Adult Authority was far stronger than that supporting the parole revocation upheld by this Court in Williams v. Dunbar, 377 F.2d 505 (9th Cir.), cert. denied, 389 U.S. 866 (1967).

Appellant claims that the dismissal of criminal charges against him by the District Attorney amounted to an acquittal. Under California law, an acquittal of criminal charges bars the Adult Authority from revoking parole solely on the basis of the same charges. In re Hall, 63 Cal.2d 115, 403 P.2d 389, 45 Cal. Rptr. 133 (1965). Federal law is contra. See Fox v. Stanford,

123 F.2d 334 (5th Cir. 1941). If appellant is contending that he was treated at variance with state law, he is not aided. As this Court has stated, "Due process questions do not arise merely because appellant has been treated at variance with state laws." Draper v. Rhay, 315 F.2d 193, 198 (9th Cir.), cert. denied, 375 U.S. 915 (1963). Accord, Beck v. Washington, 369 U.S. 541, 554-55 (1962). And at any rate, appellant was not treated at variance with state laws, for he was not "acquitted" of the criminal charges. The law of California, as applied to appellant's case, has been interpreted by the Honorable Ross A. Carkeet, Judge of the Superior Court of Tuolumne County, in an opinion denying petitioner's petition for a writ of habeas corpus (case No. 10544 in the files of that court). Judge Carkeet therein stated:

> "The Court finds that petitioner was not acquitted of said felony charge, [possession of marijuana] but same was dismissed at the preliminary hearing, and that the Adult Authority was not precluded from receiving evidence in support of the charges or making a finding of the correctness of the charge, if such evidence existed irrespective of the dismissal."

After quoting from Hall, Judge Carkeet continued:

> "[B]ut here there was neither conviction nor acquittal, and the Adult Authority had

jurisdiction to conduct its own hearing and make its own findings."

Again to adopt the findings of the District Court,

> "The dismissal of the charges on motion of the District Attorney falls short of an 'exoneration' of petitioner. It is merely an exercise of prosecutorial discretion which has no probative value." (CT 88).

This finding is, of course, correct. Whether the dismissal of the charges was the result of the District Attorney's appraisal of the merits of the case against appellant, or whether the District Attorney merely took pity on appellant and elected to place him in the hands of the Adult Authority, rather than subject him to a prosecution for a second narcotics offense with its heavy mandatory penalties, the dismissal could by no means be equated with either an "acquittal" or an "exoneration."

> "But even an acquittal of the charge would not have presented a constitutional obstacle to the action of the Adult Authority in using the presence of the marijuana in Petitioner's residence as a basis for parole revocation." (CT 88).

We might note that even if the evidence of appellant's possession of marijuana could somehow be considered insufficient, that fact would not render

revocation of his parole improper. It must be remembered that he had admitted using Dexedrine. And if some novel theory of double jeopardy could be raised as a bar to revocation of parole on the sole basis of the Dexedrine charge, since the Adult Authority had once declined to revoke parole for this violation, we submit that appellant's admitted use of Dexedrine, plus the unquestioned fact that he had not been able to avoid close contact with someone possessing large quantities of marijuana, show a pattern of drug involvement that would justify parole revocation.

II

APPELLANT HAD NO CONSTITUTIONAL RIGHT TO APPOINTMENT OF COUNSEL OR CONFRONTATION OF WITNESSES AT HIS PAROLE REVOCATION HEARING

Appellant's assertion, if he has not abandoned it, that he was constitutionally entitled at his parole revocation hearing to be represented by counsel and to confront witnesses against him, is shortly disposed of. He has no such rights. Williams v. Dunbar, 377 F.2d 505 (9th Cir.), cert. denied, 389 U.S. 866 (1967). See also Eason v. Dickson, No. 20,303 (9th Cir., January 30, 1968), p. 4 & n.3.

CONCLUSION

Before closing, we think in order a discussion of the rationale behind the persistent refusal of courts to review parole revocations. The philosophy of parole is that a duly convicted prisoner who has not completed service of his sentence may be returned to society, if at

all, only under close supervision. The parole board must be free to return a parolee to prison summarily when he has shown signs of being unable to adjust to society and avoid antisocial acts. If parole boards were subject to any significant restraint upon their power of revocation, the parole experiment would be in great danger of failure, and society would have no choice but to abandon it, thereby sacrificing a system which has been legislatively determined to be greatly advantageous to society and the prisoner alike. We adopt the words of this Court:

> "If the appellant's contentions were valid, the use by the states and the federal government of the beneficent practice of releasing prisoners from the confines of the prison to the custody and supervision of parole officers would be impracticable and would have to be abandoned. The release from the confines of the prison would become substantially equivalent to the discharge of the prisoner from his sentence, and if, as in the instant case, the parolee denied either the fact of the violation or the legal sufficiency of the act alleged to be a violation of his parole, the prison authorities would be required, in a hearing before a judge, with all the concomitants of a non-jury criminal trial, to justify their resumption of in-prison

custody of their prisoner." Williams v. Dunbar, supra at 506.

For the foregoing reasons, it is respectfully submitted that the order of the District Court denying the petition for writ of habeas corpus be affirmed.

DATED: April 10, 1968.

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: April 10, 1968

GEORGE R. NOCK
Deputy Attorney General
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